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Supreme Court, U.S.
FILED

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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

IVAN ANDRICK AND HELEN ANDRICK,
Petitioner,
v.
POOL ENERGY SERVICES CO., ET AL,
Respondents.

On Petition for Writ of Certiorari to the
United State Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether summary judgment and judgment on the pleading for the employer are appropriate in an age discrimination case brought under the ADEA in which the discharged employee has proven a *prima facie* case, and has demonstrated evidence that the only business justification for the discharge proffered by the employer is false and pretextual, and that the discharge was motivated by age discrimination.

2. Whether the exception to the employment at will doctrine in Texas prohibiting discharge of an employee for refusal to engage in illegal conduct extends to a case in which an employee is *constructively* discharged for refusal to engage in a criminal conspiracy.

LIST OF ALL PARTIES

PETITIONERS:

IVAN ANDRICK
HELEN ANDRICK

RESPONDENTS:

POOL ENERGY SERVICES CO.
RON G. HALE

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BASIS FOR JURISDICTION

1. The judgment sought to be reviewed hereby was entered on January 18, 1996.

2. An order denying a petition for rehearing was entered on February 22, 1996.

3. Jurisdiction is conferred on the Court by 28 U.S.C. § 1291.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Age Discrimination in Employment Act of 1967 29 U.S.C. §§621 et. seq. (Attached in the appendix is a complete copy of the statute).

STATEMENT OF THE CASE

This case is based on two instances of wrongful termination of Ivan Andrick. For over 31 years, Ivan Andrick worked in various capacities for Defendant Pool Energy Services Company (Pool Company) in oil drilling and related activities all over the world. He was always a good, loyal and productive employee. (Ron Hale deposition, R 1309-1310; Andrick deposition, R 1336-1337; Andrick

employment record, R 1359). When Andrick was fired, he was 63 years old, probably the oldest employee of Pool Company, with the longest service (Andrick Affidavit, R 1361-1365; Andrick employment record R 1359; Ron Hale deposition, R 1312-1313). Andrick was general manager, in charge of an oil drilling operation in Oman. Although countless overseas jobs Andrick worked on were completed or terminated or suspended for various reasons, his employment had always continued without interruption; the end of one job was always, without exception, followed by a transfer to another job. (Andrick deposition, R 1334, 1336; Andrick employment record, R 1359; Ron Hale deposition, R 1307-1308). In fact, to Andrick's knowledge no Pool Company manager had ever been fired because a job was lost, as long as the manager had been performing his duties properly. (Andrick Affidavit, R 1361-1365). After the Oman job, which Andrick was managing, was lost by Pool Company, Andrick was told by his boss, Ron Hale, executive vice president of Pool Company, that he was being considered for transfer to Tunisia, Italy, Ecuador, and the U.S. (Hale deposition, R 1307-1308; Andrick deposition, R 1338-1339). Job openings were available in most of those locations, as well as in Malaysia and Alaska, which Hale concealed from Andrick. (Andrick deposition R 1331; Andrick Affidavit, R 1361-1365).

Pool convinced Andrick to select and train his 36 year old assistant to be his replacement, telling him that they were looking for his next position, while in fact they were busy concocting a fraudulent complex scheme of shuffling general managers to avoid transferring Andrick to one of the available slots. After Andrick had completed training his replacement to look after the Pool Company investment in

Oman, he was fired, and younger men were placed in available general manager jobs in Malaysia, Italy, Ecuador, and Alaska.

Ivan Andrick was terminated by Pool on March 31, 1993. (Ivan Andrick employment record, R 1359). On April 16, 1993, Steve Orso, age 58, the general manager of the Malaysia job, was sent to Ecuador to fill a vacant general manager position. (Deposition of Hale, R 1304-1305; Steve Orso employment record, R 1358). Kerry Kunz, age 34, remained in Malaysia as operations manager and overall manager in Malaysia. The general manager's position in Malaysia was temporarily left vacant. (Hale deposition, R 1305). Steve Carlson, age 43, who was under suspicion for using company money for personal purposes (Ron Hale deposition, R 1301-1303), was transferred from Italy where he was general manager, to Malaysia, as operations manager, to replace Kerry R. Kunz. (Andrick deposition, R 1331-1332; Andrick Affidavit, R 1361-1365; Steve Carlson employment record, R 1356). Kunz, who was at that time 34 years old, was then promoted to the position of general manager in Malaysia, which has been left vacant since Orso had been transferred to Ecuador. (Ron Hale deposition, R 1305; Kunz employment record, R 1357). In May, 1993, the vacant position of general manager in Alaska was filled by Dale Larson, a new hire, who was less than 50 years of age. (Ivan Andrick deposition, R 1353-1355; Andrick Affidavit, R 13651-1365).

Ivan Andrick was indisputably qualified for the jobs of general manager in Malaysia, Italy, Ecuador and Alaska (Andrick Affidavit, R 1361-1365). Instead of placing him in one of those jobs, Ivan Andrick was fired. A 36 year old

man replaced him, a 34 year old man was promoted to general manager in Malaysia, younger men were sent to fill the general managers' positions in Tunisia, Ecuador, and Italy, and a younger man was hired from outside to fill the general manager's job in Alaska. The scheme was sophisticated, as is to be expected from someone with Hale's experience: he was formerly a personnel man, and at one time was even equal opportunity coordinator for Pool (Ron Hale deposition, R 1316). When the music stopped in this game of musical chairs, everyone had a seat except Andrick.

Recently, Frank Schirmacher, who was Andrick's direct supervisor after Ivan Andrick was re-employed by Pool in Tunisia, disclosed to Andrick that at the request of Pool Company he had signed a written document stating that there had been no position available in Tunisia or Italy for Ivan Andrick when the job was lost in Oman in 1993. Andrick confronted Schirmacher, who then admitted that, if Hale had requested him to find a manager's position for Andrick in Tunisia or Italy at that time, he could and would have done so. (Andrick Affidavit, R 1361-1365).

After this suit was filed, Andrick was offered and accepted re-employment by Pool as general manager in Tunisia beginning October 5, 1994. Andrick accepted the offer in good faith, but discovered within 30 days after arriving in Tunisia that he had walked into a trap. Ron Hale and other high Pool Company officials had much earlier designed and carried out a scheme to defraud the Tunisian government out of taxes by understating the compensation of expatriate employees subject to Tunisian taxes. Because this scheme originated and was directed from the U.S., it was a violation of U.S. as well as Tunisian law. Andrick was

continually pressured by Frank Schirmacher to participate in the continuation of the criminal conspiracy. Andrick refused to participate in the scheme. Also, as general manager in charge of the job in Tunisia, Andrick would be held responsible if and when the Tunisian government discovered the scheme, whether he had participated or not, and would most likely be incarcerated until the matter was cleared up. If that happened, Andrick knew that he could not count on Hale or Pool to help him. After increasing pressure was placed on him to sign and submit false reporting forms to the Tunisian government, while others continued to expose him to danger by perpetrating the criminal conspiracy on orders from headquarters in the U.S., Andrick reluctantly resigned. (Andrick affidavit, R 1361-1365).

BASIS FOR JURISDICTION IN THE COURT OF FIRST INSTANCE

The basis for jurisdiction of this case in the court of first instance, the U.S. District Court for the Southern District of Texas, is 28 U.S.C. § 1331.

ARGUMENT

First Point

SUMMARY JUDGMENT FOR THE EMPLOYER IN AN AGE DISCRIMINATION CASE IS NOT APPROPRIATE WHEN THE DISCHARGED EMPLOYEE HAS PROVEN A *PRIMA FACIE* CASE, AND HAS PRODUCED EVIDENCE DEMONSTRATING THAT THE ONLY REASON PROFFERED BY THE EMPLOYER FOR THE

DISCHARGE IS FALSE AND PRETEXTUAL, AND THAT THE DISCHARGE WAS MOTIVATED BY AGE DISCRIMINATION

In a summary judgment case, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). The same standard applies for judgment on the pleading. A motion for judgment on the pleading, like a motion for summary judgment, should be granted only if there is no issue of material fact, and if the pleading show that the moving party is entitled to prevail as a matter of law. Moreover, when construing a motion for judgment on the pleading, the Court is required to assume that the allegations of fact presented by the opposing party are true, and must further view the facts presented in the pleading and the inferences to be drawn therefrom in the light most favorable to the nonmoving party. *See Herbert Abstract Co. v. Touchstone Properties, Ltd.*, 914 F.2d 74, 77 (5th Cir. 1990); *Greenberg v. General Mills Fun Group, Inc.*, 478 F.2d 254, 256 (5th Cir. 1973). Andrick established a *prima facie* case of age discrimination by offering undisputed evidence that he was between the ages of 40 and 65, that he was qualified for the job of general manager of a Pool job, that he was discharged from the job of general manager of the job in Oman, and that shortly after he was fired at least four available general manager jobs in other locations were filled by Pool with younger men. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

A presumption is hereby created of unlawful discrimination by Pool. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981).

That presumption gives Pool the burden of producing evidence that the discharge was for a legitimate, non-discriminatory reason. *Id.* The reason given by Pool for firing Andrick was that there were no general manager jobs available in the Pool system to which Andrick could have been posted. At that point the *prima facie* case was rebutted, and the presumption disappeared. *Id.* at 255. Andrick then had the burden to demonstrate that the reason given by Pool was false, and that he was the victim of unlawful discrimination. *Id.* at 256. Andrick met that burden. He proved that there *were* other general manager jobs which were vacant at or shortly after the time Andrick was fired for which Andrick was qualified and which Pool staffed with younger men instead of Andrick. According to *O'Connor v. Consolidated Coin Caterers Corporation*, 116 S.Ct.1307 (1996), the fact that all of the men placed in the available general manager's jobs in front of Andrick were younger than Andrick is evidence of age discrimination even though some were over 40. Andrick additionally submitted evidence that his supervisor admitted that he could and would have found a job for Andrick had he been asked to do so, thereby again discrediting Pool's claim that after a diligent search and effort, no available general manager jobs were to be found.

Justice Scalia discussed this final burden of the plaintiff in *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742 (1993):

> The factfinder's disbelief of the reasons put forward by the defendant, (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons, will permit the trier of fact to infer the ultimate fact of intentional discrimination....*Id.* at 2749.

In reviewing the evidence and the inferences to be drawn therefrom under the *Anderson* standard; *i.e.*, in the light most favorable to Andrick, the non-moving party in the summary judgment process, the District Court should have found sufficient evidence to infer that Pool intentionally discriminated against Andrick. Instead, it chose to believe the only reason proffered by Pool, and ignored the evidence favorable to Andrick.

Hicks was not a summary judgment case, or a case on judgment on the pleading. In *Hicks*, Justice Scalia repeatedly referred to *the trier of fact* or to *the factfinder* as the one to determine the credibility or sufficiency of evidence as regards the truth or falsity of the business justification given by the employer as well as the issue of discrimination. The District Court usurped the role of the jury in this case.

Hicks has been cited in a multitude of cases, many of which disagree on how it is be applied. There is a conflict in the Courts of Appeals on the issue of the role of the District Court in determining whether the employee has presented sufficient evidence in rebuttal of the employer's proffered business justification to present the case to a jury.

The Tenth, Ninth, Eighth, and Seventh Circuits correctly interpret *Hicks* by holding that once an employee has offered evidence that the justification offered by the employer for the discharge is false, a summary judgment is inappropriate and the case goes to the factfinder. See, e.g., *Randle v. Aurora,* 69 F.3d 441 (10th Cir. 1995); *Courtney v. Biosound, Inc.*, 42 F.3d 414 (7th Cir. 1994); *Kobrin v. University of Minnesota*, 34 F.3d 698 (8th Cir. 1994); *Washington v. Garrett*, 10 F.3d 1421 (9th Cir. 1993).

The Tenth Circuit clearly follows *Hicks* in *Randle v. Aurora,* 69 F.3d 441, 443 (10th Cir. 1995), where it held that:

> If the plaintiff establishes a prima facie case and shows either that the defendant's facially nondiscriminatory reasons are pretextual or otherwise introduces direct evidence of illegal discriminatory motive, the case then moves to trial, where the presumption of discrimination created by the prima facie showing "simply drops out of the picture." (citing *Hicks*). At trial, the plaintiff must prove illegal discrimination either (inferentially by showing that the proffered reason is a pretext for discrimination; and/or (2) directly by offering direct evidence of discrimination. *Id.* at 453 (citations omitted).

That court further held:

> ...at the summary judgment stage, [the employee] can establish a sufficient possible inference of discriminatory intent by demonstrating that there is a genuine dispute as to whether the reasons offered for

> the challenged employment decision were pretextual--e.g. that they were not the true motivating reasons defendant professed them to be. *Id.* at 455.

The Ninth Circuit follows a similar interpretation of *Hicks*. *See Washington v. Garrett*, 10 F.3d 1421 (9th Cir. 1993), where the court cites *Hicks* in holding summary judgment inappropriate because "[t]here will always be a question for the factfinder once a plaintiff establishes a *prima facie* case and raises a genuine issue as to whether the employer's explanation for its action is true." *Id.* at 1433.

The Eighth Circuit also has followed *Hicks* in holding that an employee "...may overcome summary judgment by producing evidence that, if believed, would allow 'a reasonable jury to reject the defendant's proffered reasons for its actions.'" (citation omitted). *Kobrin v. University of Minnesota*, 34 F.3d 698, 703 (8th Cir. 1994).

In the Seventh Circuit, the court demonstrates a very clear understanding of the *Hicks* holding in *Anderson v. Baxter Healthcare Corp.*,13 F.3d 1120 (7th Cir.1994):

> Both *McDonnell Douglas* and *Hicks* speak to the burden the plaintiff bears at trial. However, the non-moving party, in this case the plaintiff, has a lesser burden. He must only "produce evidence from which a rational factfinder could infer that the company lied" about its proffered reasons for his dismissal. *Id.* at 1124.

In the same case, the Seventh Circuit suggested a solution to the confusion surrounding the *Hicks* ruling:

> In our view, the holding in *Hicks* is that a plaintiff is not entitled to judgment as a matter of law simply because she proves her prima facie case and shows that the employer's proffered reasons for her discharge are false. The next logical question is whether the plaintiff may prevail, not automatically as a matter of law, but through submission of her case to the ultimate factfinder, under such circumstances. *Hicks* answers this question in the affirmative. The Court explicitly states that the plaintiff *may* prevail in a discrimination case by establishing a prima facie case and by showing that the employer's proffered non-discriminatory reasons for her demotion or discharge are factually false. (citing *Hicks)* This "will permit the trier of fact to infer the ultimate fact of intentional discrimination." *Id.* at 1123-24.
>
> As the dissent in *Hicks* points out, there is language in the Court's opinion that could support a finding that additional evidence of discrimination besides establishment of a prima facie case and rejection of the employer's proffered reasons for the plaintiff's discharge is required to prove intentional discrimination. However, such language is dicta. In rejecting application of this language, we are mindful of the Supreme Court's admonishment that it is "generally undesirable, where holdings of the Court are not at issue to dissect the sentences of the United States Reports as though they were the United States Code." (citing *Hicks*) *Id.* at 1124, n.3.

In stark contrast to the Tenth, Ninth, Eighth, and Seventh Circuits, the First Circuit holds in *Woods v. Friction Materials, Inc.*, 30 F.3d 255, 260 (1st Cir. 1994) that:

> In the context of a summary judgment proceeding, *Hicks* requires that, once the employer has advanced a legitimate, nondiscriminatory basis for its adverse employment decision, the plaintiff, before becoming entitled to bring the case before the trier of fact, must show evidence sufficient for the factfinder reasonably to conclude that the employer's decision to discharge him or her was wrongfully based on age....Thus, the plaintiff cannot avert summary judgment if the record is devoid of adequate direct or circumstantial evidence of discriminatory animus on the part of the employer.

The law in the Fifth Circuit appears to be akin to that in the First Circuit, as most recently stated in *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989 (5th Cir. 1996):

> Thus, a jury issue will be presented and a plaintiff can avoid summary judgment and judgment as a matter of law if the evidence taken as a whole (1) creates a fact issue as to whether each of the employer's stated reasons was what actually motivated the employer and (2) creates a reasonable inference that age was a determinative factor in the actions of which plaintiff complains. The employer, of course, will be entitled to summary judgment if the evidence taken as a whole would not allow a jury to infer that the actual reason for the discharge was discriminatory. *Id.* at 993.

An inference of discrimination may be found if the employer's proffered reasons are shown to be false, but only if the court determines this is demonstrated through substantial evidence." *Id.* The Fifth Circuit and the First Circuit have erroneously interpreted *Hicks* to hold that the trial court should usurp the jury's role as the "trier of fact" or as the "factfinder" in the summary judgment stage. In practice, that interpretation can deprive an employee, as it did in this case, of his right to trial by jury on critical fact issues. The District Court concluded that: "In sum, the company simply did not have an available position for Andrick and his (sic) Court will not second guess the business decisions of the defendants." (Order of the District Court p. 5). In fact, what the District Court did was totally disregard the evidence proffered by Andrick that there *were* available positions which Pool filled with younger men in an unnecessary internal shuffling of general managers. The court also ignored the admission of Andrick's supervisor that he could and would have found a job for Andrick had he been asked to do so. Andrick had been told by Hale that Hale had inquired and that no jobs were available for Andrick in the entire Pool system.

This case is a perfect example of how the misinterpretation of *Hicks* in the First and Fifth Circuits can result in a grave injustice. Ivan Andrick is entitled to a determination of the factual issues in this case by a jury.

Second Point

THE COURT ERRED IN HOLDING THAT IVAN ANDRICK WAS NOT WRONGFULLY CONSTRUCTIVELY DISCHARGED UNDER

THE *SABINE PILOT* EXCEPTION TO THE EMPLOYMENT AT WILL DOCTRINE WHEN HE RESIGNED RATHER THAN OBEY HIS EMPLOYER'S REPEATED ORDERS TO VIOLATE TUNISIAN LAW AND RISK PRISON.

In 1985, the Texas Supreme Court, in *Sabine Pilot Service, Inc. v. Hauck*, 687 S.W.2d 733 (Tex. 1985), recognized for the first time as a public policy exception to the employment at will doctrine, a cause of action for wrongful discharge based on the termination of an employee for refusal to perform an illegal act. The court below held that the *Sabine Pilot* cause of action does not protect Ivan Andrick because he quit rather than continue to endure the pressure of (1) the repeated demands by Pool to engage in Pool's long-established and continuing criminal conspiracy to evade Tunisian taxes, and (2) the danger that the criminal conspiracy would be uncovered by the Tunisian authorities, and he would be incarcerated.

Andrick believed that he would eventually be fired for refusing Pool's demands to sign fraudulent expatriate personnel reporting documentation, and, as the head of the Pool Tunisian operation, would be held responsible by Tunisian authorities if the Pool criminal conspiracy were to be discovered, whether he had personally participated in the criminal conspiracy or not. (R 1361-1365).

The hopelessness of Andrick's predicament with his employer was recognized and analyzed in the case of *Higgenbotham v. Allwaste*, 889 S.W. 2d 411 (Tex. App. -- Houston [14th Dist.] 1994, writ denied), where the court acknowledged the impossibility of an employee remaining on

the job in the face of repeated employer demands to engage in illegal conduct. The opinion clearly depicts Andrick's dilemma as regards his employer: if he complied with the Pool demand he would be participating in a continuing course of illegal conduct which is morally, ethically, and legally wrong, and which would subject him to severe penalties and probably imprisonment under both Tunisian and U.S. law. If he refused to comply with the Pool demands to perform the illegal acts he would almost certainly be fired for insubordination. Of course, Ivan Andrick's position was even more desperate, because with the passage of time the possibility increased that the illegal scheme would be uncovered by the Tunisian government and Ivan Andrick held responsible as the Pool manager whether he personally participated in criminal conduct or not. (R1361-1365)

While acknowledging that the *Sabine Pilot* exception to the employment at will doctrine has been narrowed by the Texas Supreme Court in *Winters v. Houston Chronicle Pub. Co.*, 795 S.W.2d 723 (Tex. 1990), the court in *Higgenbotham* said:

> The parameters for a claim of wrongful termination for refusing to engage in illegal conduct are delineated by the Texas Supreme Court's decision in *Sabine Pilot Service, Inc. v. Hauck* 687 S.W.2d 733 (Tex. 1985) and *Winters v. Houston Chronicle Pub. Co.*, 795 S.W.2d 723 (Tex. 1990). These cases carve out an exception to the long standing rule in

Texas that employment for an indefinite term may be terminated at will and without cause. *Winters*, 795 S.W.2d at 724. This is often referred to as the "employment-at-will" doctrine. In *Sabine Pilot*, the Court acknowledged a narrow exception to this doctrine for employees discharged for the sole reason they refused to perform an illegal act, *Sabine Pilot*, 687 S.W.2d 735. *Winters* subsequently narrowed that exception by holding a plaintiff may only recover if he was"unacceptably forced to choose between risking criminal liability or being discharged..." *Winters*, 795 S.W.2d at 724.

However, we do not read *Winters* so narrowly as to hold that an employer must directly confront an employee and make an affirmative statement that the employee will be terminated if he refuses to perform an illegal act. Such a holding would insulate employers from liability so long as they merely asked the employee to do the illegal act, without mentioning possible termination, and then, if the employee refused, later discharge him. The fact that an employee refused to perform an action, whether legal or not, can be viewed as insubordination. Employees are always subject to discharge for insubordination, consequently, when an employer asks an employee to perform some act which is illegal, he automatically puts the employee to the "unacceptable" choice of risking criminal

> liability or being discharged because the employee is placed under the onus of being terminated for insubordination. 889 S.W.2d at 413.

Of course, in Tunisia Ivan Andrick didn't even have that choice. He risked criminal liability and incarceration if the continuing Pool criminal activity were to be uncovered, as well as the prospect of eventually being discharged for refusal to engage in the illegal conduct.

Constructive discharge is the traditional term used by the courts in age discrimination cases to describe the process by which Pool caused the termination of Ivan Andrick's employment by Pool in Tunisia. In the Fifth Circuit case of *Guthrie v. Penny Company, Inc.*, 803 F.2d 202 (5th Cir. 1986), the court defined the theory of constructive discharge:

> An employee can prove constructive discharge by showing that his employer created conditions so intolerable that 'a reasonable person in the employee's shoes could have felt compelled to resign....'
>
> The inquiry focuses on the employee's state of mind, and the employer's intent in creating the allegedly intolerable conditions is irrelevant at this stage.... However, the test remains objective, because it turns, not on the plaintiff's actual reaction, but on the reaction of a 'reasonable employee' in his position. *Id.* at 207. (citations omitted).

The constructive discharge doctrine was originally developed in unfair labor practice cases, and then applied to employment discrimination actions as a legal substitute for the discharge element of a prima facie case of discrimination. *See Junior v. Texaco*, Inc., 688 F. 2d 377 (5th Cir. 1982). It has been frequently used in age discrimination cases. *See also* Alan G. Skutt, Annotation, *Circumstances Which Warrant Finding Of Constructive Discharge In Cases Under Age Discrimination in Employment Act*, 93 A.L.R. FED 10 (1989). Sophisticated employers who want to fire an employee for an illegal reason have frequently tried to make the employee quit instead, in the hopes of providing the basis for a phony defense of resignation. Early on, the courts identified this subterfuge and dealt with it. As is stated in *Guthrie, supra*, the test for constructive discharge is whether under the circumstances it is reasonable to expect the employee to resign under the conditions to which he is being subjected. The point of view of the employer is irrelevant.

Without the doctrine of constructive discharge, none of the employment discrimination laws would be enforceable. Even the least sophisticated and devious employer wanting to rid itself of an "undesirable" employee can make working conditions intolerable to anyone. Certainly the courts, and particularly the Fifth Circuit, have had no problem in finding an employee to have been constructively discharged under conditions much less dangerous and desperate than those in which Andrick found himself in Tunisia working for Pool. (R 1361-1365) A representative sampling of those Fifth Circuit cases, all involving findings of constructive discharge to establish wrongful terminations in age and other discrimination cases, are found in the recent case of *Barrow v. New Orleans Steamship Assoc.* 10 F.3d 292, 300 n. 20

(5th Cir. 1991), where a managerial employee who was a college graduate was reassigned to janitorial duties. In none of the cited cases was the life and liberty of the employee placed at risk, as was Andrick's (R 1361-1365).

The Texas Supreme Court has not yet ruled on the issue of whether the *Sabine Pilot* exception to the employment at will doctrine applies in a case wherein an employee resigned rather than submit to continual pressure to engage in criminal conduct, although the discussion of this issue in *Higgenbotham, supra,* is certainly a well-reasoned indication that it will. Any decision other than to apply *Sabine Pilot* would emasculate that doctrine, and leave employers free to torture employees who refuse to engage in criminal conduct until they either submit or resign without legal recourse. The same public policy from which the exception grew requires recognition of the "constructive discharge" doctrine.

At least one other state court faced with this issue had no problem in prohibiting the *constructive* discharge of an employee who refused to engage in illegal conduct. *See Sterling Drug v. Oxford,* 743 S.W. 2d 380 (Ark. 1988).

The District Court held that "as Andrick was not terminated from the position in Tunisia but resigned from that position, he cannot as a matter of law pursue a cause of action for wrongful termination."(Order of the District Court, p.12). By that ruling the court "has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervisory powers." (Supreme Court Rules, Rule 10).

In *Harris v. Forklift Systems, Inc.*, 114 S.Ct. 367 (1993), this Court has recently spoken on the subject of onerous working conditions in a case involving a sexually hostile work environment. Sexual innuendos directed by a male supervisor to a female employee created such a hostile and abusive work environment that the employee was justified in resigning. Ivan Andrick's working conditions were much worse than hostile or abusive. They were impossible, and physically threatening. His liberty, as well as his job, was at risk. He had to resign to avoid engaging in criminal activity, or eventually be fired. In the meanwhile, he risked incarceration if he refused to follow the orders to break Tunisian law. It is absurd to say that our system of justice offers him no remedy.

Conclusion and Prayer

This court should grant the petition for writ of certiorari and reverse the courts below and remand for trial.

Respectfully submitted,

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APPENDIX A

29 USC § 621. Congressional statement of findings and purpose

29 USC § 623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

* * *

(d) Opposition to unlawful practices; participation in investigations, proceedings, or litigation

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because

such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

IVAN ANDRICK AND HELEN ANDRICK	§	
Plaintiffs,	§	
v.	§	
	§	
POOL ENERGY SERVICES CO., ET AL,	§	CIVIL ACTION NO. H-94-893
Defendants.	§	

ORDER

Pending before the Court is the Motion for Leave to File Motion for Summary Judgment in Excess of the Page Limits (Document #39) filed by defendants Pool Energy Services Company ("Pool") and R.G. Hale ("Hale"), the Motion for Summary Judgment (Document #41) filed by Pool and Hale, and the Motion for Judgment on the Pleadings (Document #69) filed by Pool and Hale. Having considered the motions, submissions, and applicable law, the Court determines that these motions should all be granted.

Plaintiffs Ivan Andrick and Helen Andrick filed their original petition in state court alleging causes of action for age discrimination, intentional infliction of emotional distress, fraud, conspiracy to defraud, and unlawful termination with the intent to deny pension benefits after Ivan Andrick was terminated from employment on March 31, 1993. Defendants removed this action to this Court pursuant to federal subject matter jurisdiction on March 17, 1994. In

September, 1994 Pool offered Ivan Andrick the a position with the company in Tunisia in September 1994 which he accepted. Subsequently, Ivan Andrick resigned from that position and filed an amended complaint in this case alleging a cause of action for wrongful termination for refusal to commit an illegal act in connection with his employment in Tunisia.

The undisputed facts in this case are that in May 1962, Ivan Andrick began his employment with a company which was subsequently acquired by Pool. From 1962 until March 31, 1993 Ivan Andrick was continuously employed with affiliates of Pool. From 1989 through March 1993, he was employed by Intairdril Oman L.L.C., an Oman company which was 49% owned by an indirect subsidiary of Pool. The primary business of Intairdril Oman L.L.C. wile Ivan Andrick was in its employment was derived from a contract in place with Petroleum Development Oman L.L.C. ("P.D.O."). On December 31, 1992, this contract was terminated necessitating the eventual cessation of Pool's operations in Oman. As area manager in Oman, Ivan Andrick was responsible for organizing the scaling down operations. Ivan Andrick's supervisor was Hale. Russell Alexander ("Alexander") was placed into the position of resident superintendent by Ivan Andrick to complete the cessation operations in Oman. At the time, Alexander was 37 years old.

Thereafter, Ivan Andrick was terminated from employment. Andrick argues that Hale assured him that he would be placed in a different position with the company in either Italy, Ecuador, Tunisia, Malaysia, or the United States. Andrick further argues that the company had always placed him in another position after the completion of an operation and that he had no reason to expect otherwise in this instance.

Pool and Hale filed the instant motions arguing that all of the plaintiffs' causes of action should be dismissed as they cannot establish a genuine issue of material fact necessary to sustain the claims. Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. of Civ. Proc. 56(c). Thus, summary judgment is mandated "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). *See also State Farm Life Ins. Co. v. Guttermann*, 896 F.2d 116, 118 (5th Cir. 1990).

Defendants argue that Ivan and Helen Andrick's claim of age discrimination should be dismissed. Plaintiffs filed the age discrimination cause of action under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§621, *et seq.* Pursuant to the ADEA, in order to establish a prima facie case of age discrimination, a plaintiff must establish: (1) that he/she was discharged; (2) that he/she was qualified for the position; (3) that he/she was within the protected class at the time of the discharge; (4) that he/she was replaced by someone outside the protected class, replaced by someone younger, or otherwise discharged because of age. *Bodenheimer v. PPG Indus. Inc.*, 5 F.3d 955, 957 (5th Cir. 1993). If the plaintiff meets these requirements, there is a presumption of discrimination which the defendant must rebut by articulating a legitimate non-discriminatory reason for the discharge. *Id.* If the employer successfully rebuts the presumption of age discrimination, the employee's prima facie case dissolves. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.10

(1981). The plaintiff then has the burden of establishing that the proffered reasons, as stated by the employer are not the real reasons for the discharge but are pretextual. However, not only must the plaintiff establish that the employers' stated reasons pretextual, but are pretextual for *age discrimination*.

In the instant case, Ivan Andrick argues that the Court should consider not only the position in Oman, but the various positions in other countries in which Pool operated, (such as Malaysia, Ecuador, Italy, Alaska, and Tunisia) in determining whether he has established a prima facie case of age discrimination. The Court determines that Ivan Andrick has established a prima facie case for age discrimination pursuant to the aforementioned factors. However, Helen Andrick has failed to establish a primae facie case for age discrimination as she had not demonstrated that she was ever employed or discharged by the defendants. Thus, Helen Andrick's ADEA claims are properly dismissed.

Having established a prima facie case of age discrimination, Pool and Hale have provided legitimate, non-discriminatory reasons for their decision to terminate Ivan Andrick. First, as the operations in Oman were being terminated, Alexander was placed in a position to wind-down operations. Alexander was receiving approximately 35% less compensation that was Ivan Andrick and was placed in an inferior position. Thus, the decision to retain Alexander in Oman to oversee the cessation operations at a reduced salary than Andrick was receiving, is a legitimate, non-discriminatory reason.

Concerning the other positions in the various counties in which Andrick argues that he could have been placed, the defendants have provided legitimate, non-discriminatory reasons for these decisions based on the experience, abilities, success at building the company's reputation, and the

relationship with the clients of the managers in those positions. In sum, the company simply did not have an available position for Andrick and his Court will not second guess the business decisions of the defendants. "The ADEA was not intended to be a vehicle for judicial second-guessing of employment decisions, nor was it intended to transform the courts into personnel managers." *Bienkowski v. American Airlines, Inc.*, 851 F.2d 1503, 1504 (1988).

As the defendants have provided legitimate explanations for not placing Andrick in another position, he must prove that the proffered reasons stated are pretexts for age discrimination. At the summary judgment stage, the Court's inquiry is whether the plaintiff has tendered factual evidence that would lead a jury to reasonable conclude that the employer's reasons are a pretext for age discrimination. *St. Mary's Honor Society v. Hicks*, 113 S.Ct. 2742, 2747 (1993). Andrick has provided no factual evidence to establish that there is a fact question concerning pretext. Thus, Ivan Andrick's ADEA claims should also be dismissed.

The defendants argue that Ivan and Helen Andricks' claims for intentional infliction of emotional distress should also be dismissed. The plaintiffs' allege that the defendants' treatment of Ivan Andrick in terminating him after 30 years service and in failing to recognize his contribution to the company constitute a cause of action for intentional infliction of emotional distress. Specifically, plaintiffs' state that Andrick was not recognized for his 30 years of service to the company, he was summarily fired without prior warning, notice or cause, he was exploited by Hale by having to select and train his "replacement" while being told that there was another position available for him, he was humiliated by his sudden termination, and further embarrassed when Hale invited him to a retirement party in his honor. Helen

Andrick alleges that the defendants intentionally caused her emotional distress by depriving her husband of an income and a paycheck that she was accustomed to receiving, causing her embarrassment, having her husband around the house and causing her to do more housework as a result, and being limited in her social activities because her husband was at home all day. *See* Document #55 (deposition of Helen Andrick).[1] However, she also stated in her deposition that had enough money to live comfortably on and was receiving retirement benefits from Pool. *Id.*

The elements of the cause of action for intentional infliction of emotional distress are: (1) the defendant acted intentionally or recklessly, (2) the conduct was extreme and outrageous, (3) the actions of the defendant caused the plaintiff emotional distress, and (4) the emotional distress suffered by the plaintiff was severe. *Twyman v. Twyman*, 855 S.W.2d 619, 621 (Tex. 1993). The issue of whether the defendants' actions were outrageous is a question of law for the Court to determine. *See Wornick Co. v. Casas*, 856 S.W.2d 732, 733 (Tex. 1993). Outrageous conduct is that which "[goes] beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Id.* at 734 (citing the Restatement 2d of Torts, § 46).

As Texas is an at-will state, the act of terminating an employee is in and of itself a legal right of the employer and can not be, by itself, the basis for an allegation of outrageous

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[1] The amended complaint states "[a]dditionally, the defendants knew that Helen Andrick, the wife of Ivan Andrick, was dependent on the income of her husband. Instead of looking forward to retirement and enjoyment of their golden years, these people are faced with the grim and bleak uncertainty of starting a new career at age 64." *See* Document #65 at 2.

behavior. *Id.* at 735. In the instant case, none of the actions of the defendants in terminating Andrick constitute outrageous conduct such that would "exceed all possible bounds of decency" and would be "utterly intolerable in civilized community." *Id.* (citations omitted). Defendants acted within their legal rights in terminating Andrick and making the decision not to place him in another position. The resulting consequences of his termination, i.e. feelings of embarrassment, humiliation, and not having a paycheck are all unfortunate effects of a termination and do not in and of themselves constitute outrageous conduct. Furthermore, the company's failure to recognize Andrick's 30 years of service to the company and giving him a retirement party do not, as a matter of law, constitute outrageous conduct. Helen Andrick's allegations that the company caused her humiliation, embarrassment, additional housework, and limited her social activities does not constitute, as a matter of law, "outrageous conduct." Thus, the Court determines that the Andricks' cause of action for intentional infliction of emotional distress should be dismissed.

The defendants also argue that summary judgment is appropriate on plaintiffs' fraud and conspiracy to defraud claims. Ivan Andrick alleges that the defendants fraudulently induced him to select and train Alexander to replace him by falsely informing him that he would be placed in another position and subsequently terminating him. The elements of a cause of action for fraud are" (1) a material representation was made; (2) that it was false or made recklessly without any knowledge of its truth and as a positive assertion; (4) that it was made with the intention that it should be acted upon by the party; (5) that the party acted in reliance upon it; and (6) the party thereby suffered injury. *Tranholm v. Ratcliff*, 646 S.W.2d 927, 930 (Tex. 1993).

In the instant case, Pool lost the contract with PDO necessitating the need for the company to cease operating in Oman. Andrick acknowledges that it was necessary to close the company down. *See* Document #40, exhibit D (deposition of Ivan Andrick). Andrick also acknowledges that Russell, who was selected and trained by Andrick to oversee the operations in Oman, did not have the same responsibilities that Andrick had, had as area manager in Oman. *Id.* Andrick also acknowledges that as part of his recommendation for closing down operations in Oman that his position be eliminated. *Id.* Finally, Andrick concedes that no one specifically told him that he would be transferred to another position if the area manger position in Oman was eliminated. *Id.* Thus, as a matter of law, Andrick has admitted that there was no material misrepresentation upon which he relied. In selecting and training Alexander to take over the remaining operations in Oman, Andrick was simply doing his job and carrying out what was the best business practice for his employer. The company attempted to place Andrick in another position but at that time, there was nothing available. When an opportunity did become available in September 1994, Hale offered and Andrick accepted the job in Tunisia. Thus, as there was no material misrepresentation made, the plaintiffs' fraud claims should be dismissed.

The elements of a cause of action for conspiracy to defraud include: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) one or more fraudulent, overt acts, and (5) damages as the proximate result. *Wilhite v. H.E. Butt Co.*, 812 S.W.2d 1, 5 (Tex. App.-- Corpus Christi 1991, no writ). The Court has already determined as a matter of law, that there is no sustainable cause of action for fraud. Therefore, there cannot be a cause of action for conspiracy to defraud. Furthermore, as a matter of law, a

corporation or other company cannot conspire with itself, no matter how many of its agents participate in the activity. *Nelson Radio and Supply Co., Inc. v. Motorola*, 200 F.2d 911, 914 (5th Cir. 1952). Thus, the cause of action for conspiracy to defraud should also be dismissed.

Plaintiffs' claim of unlawful termination with the intention of denying ERISA benefits should also be dismissed. 29 U.S.C. § 1140 states *inter alia*:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan ... or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan...

Ivan Andrick argues that after he was terminated, had the company placed him in a position in the United States, he would have become eligible to receive ERISA benefits to which employees in foreign countries were not entitled. Thus, Andrick is alleging that although he would have accepted a position in any of the various foreign countries where Pool had opportunities and where he would not have been eligible for ERISA benefits, that because one of the places he could have been placed was in the United States, where he would have been eligible for ERISA benefits, that he was terminated to prevent him from obtaining these benefits.

In *Hines v. Massachusetts Mutual Life Ins. Co.*, 43 F.3d 207 (5th Cir. 1995) the Court affirmed the district court's order granting summary judgment in favor of the defendant where the plaintiff challenged the denial of ERISA

benefits pursuant to § 1140. The Court stated that "an essential element of a Section 510 claim is proof of defendant's specific discriminatory intent." *Hines*, 43 F.3d at 209. Specific intent is a state of mind as such need not be proved as a fact, but may be inferred from the circumstances of the transaction and actions of the Defendant. *Cupit v. Whitley*, 28 F.3d 532 (5th Cir. 1994). Andrick has failed to provide any summary judgment evidence to support his claim of termination to prevent him from obtaining ERISA benefits, and as such, he has clearly failed to meet his summary judgment burden of establishing a genuine issue of material fact concerning the issue of specific discriminatory intent. In fact, in Andrick's deposition testimony, he admits that he was not terminated to prevent him from obtaining ERISA benefits. *See* Document #40, exhibit D at 116-17 (Ivan Andrick's deposition).

Helen Andrick's claim for wrongful termination of ERISA benefits should also be dismissed as she was neither a participant nor a beneficiary in any ERISA plan. Helen Andrick argues that she has a community property interest in her husband's recovery. However, as Ivan Andrick has failed to establish a genuine issue of material fact on the wrongful denial of ERISA benefits, Helen Andrick has no such claim.

Finally, plaintiffs have alleged in the amended complaint a cause of action for wrongful termination at common law. The Andricks allege that after Ivan Andrick assumed his duties in Tunisia, he became aware of a long-standing scheme by Pool to defraud the government of Tunisia of its' employees' income taxes. Andrick alleges that he protested this practice but the scheme continued and as a consequence, he involuntarily resigned and returned to the United States. Defendants have moved to have this claim dismissed as a matter of law arguing that because Ivan

Andrick was not terminated but rather that he voluntarily resigned, he cannot state a claim for wrongful termination.

The Texas Supreme Court in 1985 recognized an exception to the at-will employment doctrine: wrongful termination for refusal to commit an illegal act. *Sabine Pilot Serv. Inc. v. Hauck*, 687 S.W.2d 733 (Tex. 1993). However, as Andrick was not terminated from the position in Tunisia but resigned from that position, he cannot as a matter of law pursue a cause of action for wrongful termination. Thus, this cause of action should be dismissed. Based on the foregoing, the Court hereby

ORDERS the following:

(1) the motion for leave to file motion for summary judgment in excess of the page limits (Document #39) is GRANTED;

(2) the motion for summary judgment (Document #40) is GRANTED; and

(3) the motion for judgment on the pleadings (Document #69) is GRANTED.

SIGNED at Houston, Texas, on this 31 day of May, 1995.

/s/ David Hittner
DAVID HITTNER
United States District Judge

APPENDIX C

U.S. COURT OF APPEALS
FILED
JAN 18 1996
CHARLES R. FULDRUG III
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-20450
Summary Calendar

IVAN ANDRICK; HELEN ANDRICK,
Plaintiffs-Appellants,

versus

POOL ENERGY SERVICES, Co; R. G. Hale,
Defendants-Appellees,
and
LOUIS E. DUPREE,
Defendant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. H-94-CV-893

Before WIENER, PARKER and DENNIS, Circuit Judges.

PER CURIAM:*

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* Pursuant to Local Rule 47.5, the court has

determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4

Appellants Ivan and Helen Andrick appeal from the district court's order denying their lawsuit under the Age Discrimination in Employment Act, 29 U.S.C. § 621, and various state theories, including fraud, intentional infliction of emotional distress, and constructive discharge. They argue that the district court erred in evaluating their claims and in applying federal and state law. We have reviewed the record and the magistrate judge's report and recommendation and find no reversible error. Accordingly, we affirm for essentially the reasons given in the district court's order granting the defendants' motions for summary judgment and for judgment on the pleadings. *Andrick v. Pool Energy Services, Co., et al.*, No. H-94-983 (S.D. Tex. June 1, 1995).

Appellants' motion to file a reply brief out-of-time is DENIED and appellees' motion to strike the proposed reply brief is GRANTED.

AFFIRMED.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-20450

IVAN ANDRICK; HELEN ANDRICK
Plaintiffs - Appellants

v.

POOL ENERGY SERVICES, Co; R G HALE
Defendants - Appellees

and

LOUIS E. DUPRE
Defendant

Appeal from the United States District Court
for the Southern District of Texas, Houston

ON PETITION FOR REHEARING

(February 22, 1996)

Before WIENER, PARKER and DENNIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is denied.

ENTERED FOR THE COURT:

/s/ Robert M. Parker
ROBERT M PARKER
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL
RULES 41 FOR STAY OF
THE MANDATE